(1)

91-790

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CSX TRANSPORTATION, INC.,
Petitioner,

v.

LIZZIE BEATRICE EASTERWOOD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 205 of the Federal Railroad Safety Act, 45 U.S.C. 434, preempts application of a state tort law duty on railroads to select and install traffic-control devices at grade crossings when federal law and regulations specify that (1) public authorities, not railroads, have this responsibility, and (2) state regulation of this subject matter of railroad safety is expressly preempted.

2. Whether the fact that federal grade crossing regulations were promulgated under the authority of both the Federal Railroad Safety Act and federal highway legislation affects the express preemption mandated by Section 205 of the Federal Railroad Safety Act, 45 U.S.C. 434.

LIST OF PARTIES

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Lizzie Beatrice Easterwood

Parent Corporations

CSX Corporation

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner CSX Transportation, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on June 20, 1991.

OPINIONS BELOW

The Opinion of the Eleventh Circuit Court of Appeals is reported at 933 F.2d 1548, reprinted in the Appendix hereto, la-22a, *infra*. The Opinion of the United States District Court for the Northern District of Georgia is reported at 742 F. Supp. 676, reprinted in the Appendix hereto, 23a-28a, *infra*.

JURISDICTION

On June 20, 1991, a panel of the Eleventh Circuit Court of Appeals affirmed in part and reversed in part the grant of Petitioner's Motion for Summary Judgment by the United States District Court for the Northern District of Georgia. The Court of Appeals denied Petitioner's Motion for Rehearing and Suggestion for Rehearing *En Banc* on August 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The United States Constitution states in Article VI, Clause 2:

> This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land;

Section 101 of the Federal Railroad Safety Act, 45 U.S.C. § 421, provides:

> The Congress declares that the purpose of this chapter is to promote safety in all areas of railroad operations and to reduce railroad-related accidents. . . .

Section 202 of the Federal Railroad Safety Act, 45 U.S.C. § 431, provides:

> The Secretary of Transportation . . . shall prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety. . . .

Section 204(b) of the Federal Railroad Safety Act, 45 U.S.C. 433(b) provides:

> In addition the Secretary shall, insofar as practicable, under the authority provided by this subchapter and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction, undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem. . . .

Section 205 of the Federal Railroad Safety Act, 45 U.S.C. § 434, provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. . . .

STATEMENT OF THE CASE

A. Procedural Background.

The issue presented in this Petition arises from a fatal grade crossing accident which occurred when Respondent's husband, Thomas Easterwood, drove into the path of Petitioner's train at the Cook Street railroad crossing in the City of Cartersville, Georgia.

Invoking diversity of citizenship jurisdiction under 28 U.S.C. § 1332, Respondent filed a wrongful death action against Petitioner CSX Transportation, Inc. (hereinafter "CSXT") alleging, insofar as pertinent to this petition, negligence in CSXT's failure to install automatic gate-arms in addition to other active warning devices at the crossing. (R3-24). CSXT timely moved for summary judgment on this and all other claims, which the District Court granted in a published opinion dated August 9, 1990. *See Easterwood v. CSX Transp., Inc.*, 742 F. Supp. 676 (N.D.Ga. 1990).

The District Court held that Section 205 of the Federal Railroad Safety Act (45 U.S.C. § 434) (hereinafter referenced as "Section 434") preempted Respondent's negligence claim regarding the adequacy of the traffic-control devices at this crossing. The Court determined that the Federal Railroad Safety Act (hereinafter "FRSA") preempts state law control of any rail safety subject matter addressed in federal regulations issued by the Secretary of Transportation (hereinafter "the Secretary"). Accordingly, Respondent's negligence claim was expressly preempted since the Secretary has addressed this precise subject matter in federal regulations specifying that public authorities have the exclusive duty to select appropriate traffic-control devices at railroad crossings. *Easterwood*, 742 F. Supp. at 677-78.

On June 20, 1991, a panel of the Eleventh Circuit affirmed in part and reversed in part the District Court's grant of summary judgment. The panel agreed that the FRSA expressly preempts tort claims relating to any rail safety subject matter addressed by federal regulations. While the panel acknowledged that the Secretary has regulated the subject matter of Respondent's claim regarding crossing warning devices, it concluded that this claim was not preempted since federal grade crossing regulations were issued--in the panel's erroneous view--solely under the Secretary's authority pursuant to various highway acts, not the expressly preemptive FRSA. *See Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1555-58 (11th Cir. 1991). On August 20, 1991, the Court denied CSXT's Motion for Rehearing and Suggestion for Rehearing *En Banc*. (*See* Appendix C at 29a, *infra*).

B. Statement of Facts.

The train-vehicle collision at issue occurred at a grade crossing equipped with passive and active warnings, including three separate sets of dual, automatic red-flashing lights. Two lights were located on a signal mast next to Cook Street, two additional lights were positioned

directly over the center of Cook Street, and two further lights faced Mr. Easterwood from a separate signal mast. The crossing was also marked by two crossbuck signs, an advance railroad warning sign, and a large "RxR" pavement marking.

These traffic-control devices were upgraded several years before the incident pursuant to a federally-mandated grade crossing safety evaluation conducted by the Georgia Department of Transportation (hereinafter "GDOT"). (Affidavit of Wendall Hester, Manager of the GDOT Rail-Highway Grade Crossing Section, ¶4). Pursuant to federal regulations, the GDOT evaluated this and other Cartersville grade crossings and ordered the installation of automatic gate-arms at four adjacent crossings. While the GDOT initially recommended gate-arms at Cook Street, the City objected to GDOT's recommendation because the installation of gate-arms required the construction of traffic-islands which would inhibit tractor-trailer movement at nearby vehicular intersections. (*Id.* at ¶6). The GDOT ultimately decided *not* to add gate-arms to the warning equipment at Cook Street but instead upgraded the crossing's electronic train detection devices. (*Id.* at ¶¶ 5, 7). The GDOT evaluated the crossing and implemented these safety improvements explicitly pursuant to federal grade crossing regulations. (*Id.* at ¶¶ 5, 7).

REASONS FOR GRANTING THE WRIT

I.

THE PANEL'S DECISION UNDERMINES A UNIFORM FEDERAL SCHEME TO IMPROVE GRADE CROSSING SAFETY.

The decision below, premised on a glaring error as to the statutory authority for federal grade crossing regulations, threatens a nationally uniform regulatory structure that has systematically improved crossing safety on a national level. This decision sanctions the same *ad*

hoc, dual system of federal-state rail safety regulation that Congress explicitly sought to eliminate through the FRSA. At stake is the vitality of a regulatory approach to crossing safety, preemptive of state regulation by express congressional design, that directly affects the safe operation and economic viability of the nation's railroads.

Since 1974, the federal government has spent more than two billion dollars under this regulatory structure to implement safety improvements at more than 25,000 railroad crossings nationally. United States Department of Transportation, *The 1991 Annual Report on Highway Safety Improvement Programs by the Secretary of Transportation to Congress*, at S-2 (Apr. 1991). The Secretary recently characterized this regulatory program as the most effective traffic-safety improvement effort ever undertaken, reducing fatal accidents at grade crossings by an astonishing 88 percent, nonfatal injuries by 62 percent, and preventing "over 6400 fatalities and 26,500 non-fatal injuries since 1974"--even though traffic volume increased dramatically during this same period. *Id.* at IV-5.

Congress established this regulatory approach to grade crossing safety shortly after it enacted the FRSA. *See* Pub. L. No. 91-458, 84 Stat. 971, codified as amended at 45 U.S.C.A. §§ 421-444 (1986). As a precursor to actual regulation, the FRSA required the Secretary to study all railroad safety issues, specifically including "the problem of eliminating and protecting railroad grade crossings." 45 U.S.C. § 433(a). The FRSA also charged the Secretary to implement solutions to the grade crossing problem "under the authority provided by [the FRSA] *and* pursuant to [the Secretary's] *authority over highway, traffic, and motor vehicle safety*." 45 U.S.C. § 433(b) (emphasis added). In response, the Secretary published a study in 1972 criticizing dual federal-state regulation as inefficient and haphazard, thus requiring "national coordination" to promote safety:

> [J]urisdiction over railroad-highway intersections resides exclusively in the States. Responsibility is frequently divided among several public agencies and the railroad. *The net effect results in a fragmented approach to grade crossing safety*. The need for national coordination of an issue that affects the Nation's railroad and highway systems is apparent.

United States Department of Transportation, *Report to Congress: Railroad-Highway Safety, Part II: Recommendations for Resolving the Problem*, at vii (Aug. 1972) (emphasis added). The Secretary also recognized the anomaly of placing responsibility for the selection of traffic-control devices on railroads:

> The concept of dual responsibility for grade crossing protective devices . . . is unique. It is the only location along the highway where the highway authorities do not have total responsibility for and control over the installation, operation and maintenance of traffic control devices.

Id. at 33. The Secretary determined that public authorities should, for the first time, assume "additional responsibility with regard to grade crossing protective devices" and design traffic-control systems at crossings under uniform federal criteria with due regard for the functional characteristics of the roadway involved. *Id.*

As described below, the Secretary acted to improve grade crossing safety pursuant to the FRSA and his authority over highway safety. In 23 C.F.R. Parts 646, 655, 924 and 1204, the Secretary established a nationally uniform body of regulation explicitly specifying that public authorities, not railroads, have the exclusive duty to (1) evaluate grade crossings, (2) select appropriate traffic-control devices according to federal criteria, and (3) implement improvements. These regulations not only

assign to public authorities the exact duty which Respondent seeks to impose on CSXT, they expressly state that "[p]rojects for grade crossing improvements are deemed to be of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." 23 C.F.R. 646.210(b)(1). Absent preemption, and under the decision below, the threat of tort law damages imposes on railroads the duty to create and fund private processes for the evaluation and selection of traffic-control devices at crossings despite federal law and regulation to the contrary.

In order to avoid this "fragmented" approach to crossing safety, the FRSA defines explicitly the preemptive scope of the Secretary's regulations. Simply put, once the Secretary regulates a rail safety subject matter, state regulation is expressly preempted. 45 U.S.C. § 434. Any other conclusion is contrary to explicit statutory authority and the FRSA's goal of national uniformity. As the District Court stated in oral argument, "[i]f you allow a common law action [against a railroad for failing to install gate-arms], then preemption is out the window." (Tr. at 38). Allowing juries to determine the adequacy of traffic-control devices completely contradicts the regulatory determination "that grade crossing improvements [are] a governmental responsibility rather the responsibility of the railroads. . . ." *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861, 863 (D. Kan. 1986). The Eleventh Circuit's failure to acknowledge the preemptive statutory authority for the Secretary's regulations creates a *de facto* state law regulatory scheme "completely at odds with the language of section 434, the structure of the FRSA as a whole, and Congressional purpose in adopting the statute." *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1237 (N.D. Ind. 1987). Indeed, regulation through a hodgepodge of different rules, regulations, or jury verdicts ostensibly designed to reduce hazards, "do not, in the larger picture, reduce hazards at all, but rather may create them." *City of*

Covington, Ky. v. Chesapeake & Ohio Ry. Co., 708 F.Supp. 806, 808 (E.D.Ky. 1989).

This Court's guidance is needed to resolve a growing conflict as to the preemptive force of the Secretary's regulations. Numerous federal and state courts have held that these regulations expressly preempt any state law duty on railroads to select and install traffic-control devices. The Ninth, Fifth and Sixth Circuits have also rendered decisions in conflict with the Eleventh Circuit's holding and analysis. Dozens of other courts now confront this issue in pending litigation. A failure to review the decision below not only jeopardizes an effective and uniform approach to a national problem, it subjects the nation's railroads to "an unpredictable medley of jury determinations, which Congress, in its quest for national uniformity under § 434, sought to avoid." *Rayner v. Smirl*, 873 F.2d 60, 66 (4th Cir.), *cert. den.* 110 S.Ct. 213 (1989).

II.

THE DECISION BELOW CONFLICTS WITH EXPLICIT STATUTORY AUTHORITY

CSXT respectfully submits that the Eleventh Circuit correctly interpreted the FRSA's expressly preemptive scope in almost all material respects except the source of statutory authority for federal grade crossing regulations. The decision below correctly (1) construed the FRSA to preempt any state law claim relating to a rail safety subject matter addressed in federal regulations, (2) acknowledged that the Secretary's grade crossing regulations address Respondent's claim, but (3) *misconstrued* the statutory authority for these regulations. *See Easterwood*, 933 F.2d at 1552-55. Significantly, the panel agreed with each step of an express preemption analysis only to err as to the statutory authority for regulations which address and preempt Respondent's claim.

A. *The FRSA'S Language and Legislative History Evidence a Clear Congressional Intent to Eliminate State Regulation of Crossing Safety.*

The Eleventh Circuit acknowledged that the FRSA's legislative history plainly demonstrates Congress' intent to eliminate dual federal-state regulation:

> The legislative history indicates that Congress was wary of the role of the states in rail safety. The House Report stated that "[t]he committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." H.R. Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4109,. The committee also noted that "where the federal government has authority, with respect to rail safety, it *preempts the field*." House Report at 4108 (emphasis added).

Easterwood, 933 F.2d at 1552. Congress' intent to preempt state regulation is established by the FRSA's language, its legislative history, and in case law interpreting its provisions.

First, Congress expressly defined the broadly preemptive intent of the Act by charging the Secretary to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for *all areas of railroad safety*. . . ." 45 U.S.C. § 431(a) (emphasis added). Congress "'define[d] explicitly'" the FRSA's preemptive scope and expressed its intent to eliminate continuing state regulation of any aspect of rail safety addressed by the Secretary. *Armijo v. Atchison, T. & S.F. Ry. Co.*, 754 F. Supp. 1526, 1530 (D.N.M. 1990) (quoting *English v. General Elec. Co.*, 110 S.Ct. 2270, 2275 (1990)). Specifically, Congress declared in Section 434

that rail safety regulation should be nationally uniform and that state regulation should be proscribed:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be *nationally uniform* to the extent practicable. A *State may adopt or continue in force any law*, rule, regulation, order, *or standard* relating to railroad safety *until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement*. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

45 U.S.C. § 434 (emphasis added). *See Easterwood*, 933 F.2d at 1553 n.3 (rejecting argument that Respondent's claim fell within "local safety hazards" exception to express preemption).

Second, the FRSA's legislative history demonstrates that "[t]he issue of federal preemption was vigorously debated, leaving a clear record of congressional intent for virtually complete federal preemption in the area of railroad safety laws." *CSX Transp., Inc. v. Public Utils. Comm'n of Ohio*, 701 F. Supp. 608, 613 (S.D. Ohio 1988), *aff'd*, 901 F.2d 497 (6th Cir. 1990), *cert. den.* 111 S.Ct. 781 (1991) (*"P.U.C.O."*). Preemption was the "turning point" or central feature of the FRSA. *Hearings Before the House Subcommittee on Transportation and Aeronautics*, 91st Cong., 2d Sess. 43, 114 (May 23, 1970), (remarks of Reps. Springer and Kuykendall). Congress determined that the former dual federal-state approach inadequately promoted safety, *see* House Report at 4104, 4109, 4117, and recognized

the need for a uniform body of regulation applicable to a national transportation system:

> [T]he railroad industry has very few local characteristics. Rather, . . . it has a truly interstate character calling for a uniform body of regulation and enforcement. . . . To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

Id. at 4110-11.

Finally, numerous decisions have acknowledged the Act's expressly preemptive effect. The Third and Fourth Circuits have stated that FRSA Section 434 evinces a *"total preemptive intent"* by Congress over all areas of rail safety addressed by federal regulation. *National Ass'n of Regulatory Utils. Comm'rs v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976); *Rayner*, 873 F.2d at 65. *See Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir), *cert. den.* 414 U.S. 855 (1973) ("[FRSA] regulatory scheme has pre-empted the field of railroad safety").[1] Even the panel below recognized that Congress *"explicitly stated that it intended to pre-empt all state regulations covering the same subject matter as the federal regulations."*

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[1] The following decisions state that Section 434 is "broadly preemptive," "totally" preemptive, or an "explicit preemption provision": *Norfolk & W. Ry. Co. v. Public Utils. Comm'n*, 926 F.2d 567, 570 (6th Cir. 1991); *CSX Transp., Inc. v. City of Thorsby, Ala.*, 741 F. Supp. 889 (M.D. Ala. 1990); *Covington*, 708 F. Supp. at 808; *P.U.C.O.*, 701 F. Supp. at 612-13; *Missouri Pac. R.R. v. Railroad Comm'n*, 671 F. Supp. 466, 471 (W.D. Tex 1987), *aff'd* 850 F.2d 264 (5th Cir. 1988), *cert. den.* 488 U.S. 1009 (1989) (*"MOPAC II"*); *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1236 (N.D. Ind. 1987).

Easterwood, 933 F.2d at 1553 (emphasis added).[2] Because Congress realized that "'[t]he motoring public is part of the safety problem at the grade crossing,'" *Easterwood*, 933 F.2d at 1553 (quoting House Report, Appendix F, at 4130), the FRSA effectuated a regulatory shift allocating to public authorities the exclusive responsiblity to evaluate crossings and select appropriate traffic-control devices. The FRSA therefore bars a lay jury from superimposing its own determination on this issue.

B. The Secretary's Decision to Regulate the Duty to Select Crossing Protection Expressly Preempts State Tort Law Regulation of the Same Subject Matter.

Pursuant to the FRSA and federal highway acts, the Secretary has established a comprehensive regulatory scheme that defines the specific criteria for selecting, and the railroad's lack of responsibility for choosing, appropriate traffic-control at grade crossings.

1. Federal legislation allocates to public authorities the duty to evaluate the need for traffic-control devices at grade crossings.

After the Secretary's 1972 study recommended the shift of responsibility for crossing signalization from railroads to public authorities, Congress passed the Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 250, and created a pervasive federal scheme to improve safety at the nation's grade crossings. Congress (1) required each state to maintain a survey of crossings to "identify those railroad crossings which may require separation, relocation, or protective devices. . . ," *id.* at §203(a) (23 U.S.C. § 130(d)), (2) directed state authorities to

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[2] Preemption applies regardless of whether state regulation takes the form of a statute, an ordinance, a facet of the state's common law, or an individual award of state tort law damages. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). The *Easterwood* panel correctly rejected the argument that "tort law is somehow immune to pre-emption." *Easterwood*, 933 F.2d at 1552 n. 2.

"establish and implement a schedule of projects for this purpose. . .," *id.*, (3) earmarked nearly $80,000,000 solely for the installation of crossing devices, (4) defined detailed methods for selecting crossing protection, and (5) required states to report annually to the Secretary on efforts to implement the federal regulatory scheme. Simply stated, the 1973 Act reflected the FRSA's mandate that crossing safety be addressed through nationally uniform regulations implemented by responsible state and local authorities. Since 1973, Congress has reaffirmed this preemptive scheme vesting in public authorities the exclusive duty to select traffic-control devices at crossings.[3] *See generally* 23 U.S.C. §§ 109(e), 120(d), 130, 315 and 402.

2. Federal regulations require public authorities to select traffic-control devices at crossings.

The Secretary has issued a score of regulations under authority of both the FRSA and various highway acts for the installation of traffic-control devices at crossings. *See* 23 C.F.R. §§ 646.200, 655.603, 924.7 through 924.11 and §1204.4 (No. 13, ¶ I.D.5). *See generally* 23 C.F.R. Parts 646, 655, 924, and 1204. These regulations require each state to create a detailed highway safety improvement program that (1) collects accident, traffic, and highway data for all grade crossings, (2) evaluates "[t]he relative hazard of public railroad-highway grade crossings based on a hazard

[3] The Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, 92 Stat. 2689, appropriated over $440,000,000 to state transportation agencies to install automatic traffic-control devices, § 203(a), and expanded the program to include *all* crossings on *"any public road,"* § 203(b) (emphasis added). The Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 32, reaffirmed this preemptive regulatory scheme and reenacted the priority-based implementation approach first contained in the 1973 Act. *See* 23 U.S.C. § 130(d). In October 1991, by a vote of 95 to 3, the United States Senate approved H.R. 2942, allocating $16.8 billion for the Federal-Aid Highway Program (which funds the federal scheme for grade crossing improvements), thereby increasing funding by 16% over 1991 levels.

index formula," and (3) schedules improvement projects according to a priority-based index in 23 C.F.R. § 924.9. This complex federal scheme specifically designates that state and local authorities, not railroads, are responsible for carrying out the very tasks which Respondent seeks to impose on CSXT under state law.

Not only do these federal regulations constitute "action by the Secretary" on the "subject matter" of Respondent's claim, the Secretary has expressly stated that all crossing devices must comply with the Manual on Uniform Traffic Control Devices (rev'd. ed. 1988) (hereinafter "MUTCD"). *See* 23 C.F.R. §§ 646.214 (requiring uniform standards); 655.601 and .603(a) (adopting the MUTCD as the national standard). The MUTCD explicitly states that public authorities have the express duty to select appropriate traffic-control devices at crossings:

> *The determination of the need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority.* Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

MUTCD ¶ 8A-1 (emphasis added). *See also id.* at § 8D-1 (the "selection of traffic control devices at a grade crossing is determined by public agencies having jurisdictional responsibility at specific locations"). The opinion below contradicts this legislative and regulatory decision to vest the choice of appropriate traffic-control devices in state and local authorities rather than railroads.

III.

THE DECISION BELOW CREATES A CONFLICT IN THE CIRCUITS

A. *The Decision Below Conflicts With the Ninth Circuit's Interpretation of the FRSA and the Decisions of Numerous Federal and State Courts.*

Numerous state and federal courts, including the Ninth Circuit, have determined that federal regulations preempt a state law duty on railroads to install traffic-control devices under the penalty of damage awards. As Justice Kennedy stated, "the Secretary has delegated federal authority to regulate grade crossings to local agencies" whose determinations constitute federal decisions and have a preemptive effect. *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983). That is, *"Congress determined that grade crossing improvements [are] a governmental responsibility rather than the responsibility of the railroads. . . ."* *Sisk*, 647 F. Supp. at 863 (emphasis added). As another federal court recently determined, "federal grade crossing regulations preempt state law claims against railroads predicated upon negligence in selecting or providing additional warning devices." *Armijo*, 754 F. Supp. at 1531. Other federal and state courts have agreed. *See, e.g., Smith v. Norfolk & S. Ry. Co.*, No. 590-494 (N.D. Ind. Oct. 8, 1991); *Conner v. Missouri Pac. R.R.*, No. 90-C-562-E (N.D. Okla. March 14, 1991); *Mahony v. CSX Transp., Inc.*, No. 4:88-CV-13-HLM, 6-7 (N.D. Ga. Feb. 6, Apr. 16, 1990); *Nixon v. Burlington N. R.R. Co.*, No. CV85-384-BLG (1988 U.S. Dist. Lexis 16477) (D.Mont. Apr. 2, 1988); *Barger v. Chesapeake Ohio Ry.*, No. 90AP-402 (Ohio App. Nov. 15, 1990).

The Eighth Circuit is the only Court of Appeals to have rendered a decision consistent with the holding, but not the reasoning, of the panel's non-preemption ruling in this case. In *Karl v. Burlington N. R.R. Co.*, 880 F.2d 68 (8th Cir. 1989), the Court addressed preemption only in

passing and rejected a "belated" attempt by the railroad to assert FRSA preemption. *Karl* (1) mistakenly cited *Marshall* for the proposition that the FRSA does *not* preempt a negligence claim against the railroad when public authorities have chosen particular traffic-control devices for a crossing, (2) erroneously relied upon common law cases in which preemption was not raised, and (3) incorrectly applied an *implied* preemption test. The *Armijo* Court found *Karl* completely unpersuasive for the following reasons:

> The *Karl* Court did not discuss the express preemption provision in 45 U.S.C. § 434. Rather, it focused on generally how state laws may be preempted if they actually conflict with [federal law]. . . . [T]he *Karl* decision ignores the first circumstance . . .where state law is preempted. . . when Congress defines explicitly the extent to which its enactment preempts state law. . . . In light of the express provision in §434, there is no need to determine whether state law in this case actually conflicts with the federal law. . . .

Armijo, 754 F. Supp. at 1532 n.4.

Although the panel below reached a result consistent with *Karl's* holding, it clearly disagreed with the *Karl* analysis by finding that the FRSA expressly preempted Respondent's "train speed" claim given the Secretary's promulgation of federal train speed regulations. *Easterwood*, 933 F.2d at 1553-54. The panel also acknowledged that the Secretary had addressed the subject of Respondent's gate-arms claim, *id.* at 1553-54, and implicitly reasoned that federal grade crossing regulations would have preempted this claim if promulgated under FRSA authority. Nevertheless, the panel erroneously found that the Secretary's grade crossing regulations were promulgated solely under the authority of the non-preemptive Federal-Aid Highway Act, not the expressly-preemptive FRSA. As demon-

strated below, this holding is clearly erroneous and creates a significant conflict in the circuits. *Id.*

B. *The Decision Below Creates a Conflict in the Circuits on the Secretary's Statutory Authority to Regulate Rail Safety.*

The panel below erred in three material respects by finding that the Secretary's grade crossing regulations, which would preempt Respondent's claim under the panel's own analysis, lack preemptive effect because they were not promulgated under the FRSA. First, these regulations *were* promulgated under the Secretary's express FRSA authority. Second, even if the Secretary had issued the regulations *solely* pursuant to federal highway legislation, Section 204(b) of the FRSA (45 U.S.C. § 433(b)) encompasses such regulations within the FRSA's preemptive scope. Finally, the Fifth and Sixth Circuits, as well as numerous other courts, have held that *any* rail safety regulation promulgated "by the Secretary" is expressly preemptive under the FRSA.

Preliminarily, the panel's holding ignores the Secretary's delegation of rulemaking authority to several agencies within the Department of Transportation, which includes the Federal Railroad Administration ("FRA"), the Federal Highway Administration ("FHWA"), and other agencies. *See* 49 U.S.C.A. § 102-104 (1991 Sp. Pamphlet). The Secretary delegated rulemaking authority under numerous statutes (including the FRSA) to both the FRA and the FHWA. *See generally* 49 C.F.R. §§ 1.48 and 1.49. In stating that "the Secretary of Transportation has not promulgated any regulations regarding grade crossings under his general power to regulate railroad safety," the panel mistakenly confined its consideration to only those regulations promulgated by the Secretary through the *FRA*. *Easterwood*, 933 F.2d at 1555. The panel

wrongly assumed (1) that the grade crossing regulations were not issued under authority of the FRSA, and (2) that the Secretary's decision to address crossing safety in part under his authority to regulate highway safety somehow divested the regulations of their preemptive effect.

1. The Secretary regulated crossing safety under authority of the FRSA.

The Secretary promulgated the regulations in 23 C.F.R. Parts 646, 655, 924, and 1204 *under authority of the FRSA*. Specifically, 49 C.F.R. § 1.48(o) and the "Statements of Authority" cited by the Secretary flatly contradict the panel's myopic assumption that the Secretary did not issue these regulations pursuant to preemptive FRSA authority. The Secretary's grade crossing regulations were established by the FHWA pursuant ***both*** to federal highway legislation ***and*** Section 204(b) of the FRSA (45 U.S.C. § 433(b)), and were issued *"under authority of"* various sections of the federal highway acts *and* 49 C.F.R. § 1.48. *See* 23 C.F.R. § 646.200 (Statement of Authority referencing 49 C.F.R. 1.48(o)); Part 655 (same); Part 924 (same); and Part 1204 (same). Specifically, under 49 C.F.R. 1.48(o) the Secretary delegated to the FHWA the authority to regulate grade crossings pursuant to Section 204(b) of the FRSA, 45 U.S.C. § 433(b):

> The [FHWA] is delegated authority to:
>
> (o) *Exercise the authority vested in the Secretary by section 204(b) of the Federal Railroad Safety Act of 1970* (84 Stat. 972, 45 U.S.C. 433(b)) with respect to the laws administered by the [FHWA] pertaining to highway safety and highway construction.

49 C.F.R. § 1.48(o). Thus, FRSA Section 433(b) empowers the Secretary to regulate grade crossing safety under his or her authority over highway safety. The panel ignored Section 433(b) and erroneously confined its consideration to the Secretary's power to regulate under 45 U.S.C.

431(a)(1). *See* 933 F.2d at 1555. Since the Secretary clearly issued federal grade crossing regulations under FRSA authority, however, Respondent's claim is expressly preempted.

2. Even if the Secretary had regulated *solely* under authority of federal highway laws, Section 434 expressly preempts Plaintiff's claims.

Even if the Secretary had issued the regulations solely under federal highway legislation, the FRSA expressly encompasses such regulations within the preemptive scope of Section 434. The Secretary's authority for promulgating grade crossing safety regulations is codified at 45 U.S.C. § 433(b), which directs the Secretary to address grade crossing safety *under his or her authority over highway and traffic safety:*

> In addition [to conducting the study of grade crossing safety mandated under § 433(a),] the Secretary *shall . . . under the authority provided by this subchapter and pursuant to his authority over highway, traffic, and motor vehicle safety,* and highway construction, . . . implement[ ] solutions to the grade crossing problem. . . .

45 U.S.C. 433(b) (emphasis added). Thus, the FRSA expressly contemplates the Secretary's use of authority granted under federal highway legislation to regulate and allocate the duty for selecting traffic-control devices at crossings.

The same FRSA House Report referenced in the panel opinion states that Congress was keenly aware that "problems will arise which cut across the existing statutes and the [FRSA]. In those situations, *the Secretary will be expected, if necessary, to issue rules under two or more statutes."* House Report at 4114 (emphasis added). Accordingly, the Secretary expressly utilized authority granted under both the FRSA and federal highway

legislation to regulate the very issue that Respondent claims should be subject to state law control.

3. As the Fifth and Sixth Circuits have held, Section 434 preempts state regulation regardless of the Secretary's regulatory authority.

Finally, federal courts have uniformly held that Section 434 expressly preempts state law application to any rail safety subject matter addressed by a "rule, regulation, order or standard" adopted under *any source* of the Secretary's authority. As stated in *Atchison T. & S.F.Ry. v. Illinois Comm. Comm'n.*, 453 F. Supp. 920 (N.D. Ill. 1977):

> "The [FRSA] provides that state action is preempted when the Secretary has issued orders or regulations covering the field. *This [preemption] is not limited to those [regulations] promulgated under that Act, but refers instead to any action taken by the Secretary."*

Id. at 924. In other words, the statutory source of authority for the Secretary's rail safety regulations is irrelevant:

> Section 434 refers to acts by 'the Secretary,' . . . and does not confine itself to acts pursuant to the FRSA. Thus, an act by the Secretary pursuant to . . . [a federal act that lacks a preemption provision] could preempt state law under the terms of Section 434.

Missouri Pac. R.R. v. Railroad Comm'n of Texas, 671 F. Supp. 466, 471 n.1 (W.D. Tex. 1987), *aff'd* 850 F.2d 264 (5th Cir. 1988), *cert. den.* 488 U.S. 1009 (1989) (*"MOPAC II"*). "Preemption is not limited to those regulations promulgated under the FRSA, but refers instead to any other rule, regulation, order or standard. . . adopted by the Secretary." *CSX Transp., Inc. v. City of Tullahoma,* 705 F.Supp. 385, 389 (E.D. Tenn. 1988).

The Sixth Circuit likewise stated that "FRSA preemption relates to *all* rules and regulations regarding railroad safety *promulgated by the Secretary*, whether or not such regulations are promulgated by the [FRA]. . . ." *CSX Transp., Inc. v. Public Utils Comm'n of Ohio*, 901 F.2d 497, 501 (6th Cir. 1990), *cert. den.* 111 S.Ct. 781 (*"P.U.C.O."*) (emphasis in original). Ohio petitioned this Court for review of the Sixth Circuit's interpretation that the source of the Secretary's regulatory authority for issuing rail safety regulations does not alter the preemptive effect of the Secretary's decision to regulate. Before denying certiorari, this Court requested the Solicitor General to express the views of the United States. *See* 111 S. Ct. 35. The United States agreed with the conclusion that Congress intended FRSA preemption to apply to *all* rail safety regulations issued by the Secretary, *whether pursuant to the FRSA or any other act*. *See* Brief of United States as *Amicus Curiae* to the Supreme Court in *P.U.C.O.*, No. 90-95, at 8-13 (October Term, 1990). The Solicitor General described the FRSA's legislative history as evincing an "intensive debate" over the "all-encompassing preemption provision" in the Act, and concluded that *any* regulation relating to rail safety expressly preempts state law:

> Congress did not intend to limit the preemptive scope of the FRSA to regulations enacted under power given to the Secretary under the FRSA alone; rather, it contemplated that *all* of the Secretary's regulations relating to rail safety . . . would give rise to nationally uniform standards.

Id. at 7, 9 (emphasis in original). In other words,

> [Congress] recognized that the Secretary had diverse sources of statutory authority, enacted over many years, with which to address rail safety issues. . . . [and that] preemption had to apply to regulations issued, not only under the new authority provided by the FRSA, but also under the preexisting authority; otherwise, the desired uniformity could not be attained.

Id. at 11. The Eleventh Circuit's determination that federal grade crossing regulations are not preemptive under the FRSA flatly contradicts the Fifth and Sixth Circuit decisions in *MOPAC II* and *P.U.C.O.* and creates a clear conflict in the circuits.

The foregoing discussion leads inexorably to the three unshakable conclusions that merit this Court's review. First, the Secretary's "Statements of Authority" for the grade crossing regulations in issue explicitly reference the FRSA as an authorizing source of regulatory authority. These regulations are therefore expressly preemptive. Second, Congress' explicit command in the FRSA that the Secretary address grade crossing safety under his or her authority over "highway traffic safety" makes clear that Section 434's preemptive effect reaches the grade crossing regulations even if the Secretary had not utilized FRSA statutory authority. Third, uniform federal opinion, including *P.U.C.O.*, *MOPAC II*, and the well-reasoned position of the United States, compel the conclusion that the Secretary's regulation of grade crossing safety preempts Respondent's claim under FRSA Section 434 regardless of the statutory authority for the regulations issued.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Eleventh Circuit in this case.

This 15th day of November, 1991.

Respectfully submitted,

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APPENDICES

Appendix A

Opinion of The United States Court of Appeals

Mrs. Lizzie Beatrice EASTERWOOD,
Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

No. 90-8851.

United States Court of Appeals,
Eleventh Circuit.

June 20, 1991.

Appeal from the United States District Court for the Northern District of Georgia.

Before JOHNSON and COX, Circuit Judges, and HENDERSON, Senior Circuit Judge.

JOHNSON, Circuit Judge:

This case arises on appeal following the district court's grant of a motion for summary judgment in favor of the defendant on the basis of federal preemption. 742 F. Supp. 676.

I. STATEMENT OF THE CASE

Thomas Easterwood, on February 24, 1988, was working for the Duncan Wholesale Company delivering wood products in a long bed truck in Cartersville, Georgia. While crossing the Cook Street railroad grade crossing, he was struck and killed by a CSX train.

On June 3, 1988, Lizzie Beatrice Easterwood, Thomas' widow, filed the wrongful death action in district court. CSX answered, but it made no reference to the Federal

Railroad Safety Act in its pleading. The District Court ordered discovery completed by November 30, 1989 and any motions for summary judgment filed within 20 days of that date. On December 19, 1989, CSX moved for summary judgment, alleging, among other things, that the Federal Railroad Safety Act provided a complete defense. Easterwood did not complain to the district court about CSX's failure to raise this defense in its answer. The district court granted summary judgment. Easterwood brought a timely appeal to this court.

II. STANDARD OF REVIEW

The district court order granting summary judgment is subject to *de novo* review by this Court. *See Shipes v. Hanover Ins. Co.*, 884 F.2d 1357 (11th Cir.1989). This Court must ask whether there is any genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

III. ANALYSIS

A. *The Failure to Raise the Pre-Emption Defense in the Answer*

In its motion for a summary judgment, CSX raised for the first time the possibility that Easterwood's state law negligence claims were pre-empted by federal law. Easterwood now claims that federal pre-emption is an affirmative defense which should have been raised in CSX's answer. *See* Fed.R.Civ.P. 8(c). If federal pre-emption is an affirmative defense, CSX's failure to specifically plead the defense in its answer or amended answer results in the waiver of this defense. *See Morgan Guar. Trust Co. of N.Y. v. Blum*, 649 F.2d 342, 345 (5th Cir. Unit B 1981).

[1] Easterwood's failure, in the district court, to raise the argument that federal pre-emption is an affirmative defense prevents us from sanctioning CSX for its failure to

include this affirmative defense in its answer. As a "general principle of appellate review[,] an appellate court will not consider issues not presented to the trial court." *McGinnis v. Ingram Equip. Co., Inc.*, 918 F.2d 1491, 1495 (11th Cir.1990) (en banc). One exception to this rule is "when a pure question of law is involved and a failure to consider it would result in a miscarriage of justice." *Martinez v. Mathews*, 544 F.2d 1233, 1237 (5th Cir.1976). While it is undisputed that whether this affirmative defense was waived is a pure question of law, neither party can argue that our decision not to reach the issue would result in a miscarriage of justice. First, had Easterwood mentioned this technical failure of the pleadings before the district court, the district court could have given CSX leave to amend its answer, *see* Fed.R.Civ.P. 15(a), thus remedying any problem. Second, our Circuit has noted that the purpose of requiring affirmative defenses to be pled in the answer is to facilitate trial preparation. *See Hassan v. United States Postal Serv.*, 842 F.2d 260 (11th Cir.1988). In the past, we have been reluctant to enforce strictly the harsh waiver requirement where the plaintiff is unable to demonstrate any prejudice due to the lack of notice. *Id.* Easterwood has not established any prejudice due to this technical failure of the pleadings. Not only did Easterwood fail to move to reopen discovery, but she also told the district court, during oral arguments, that the existing exhibits, affidavits, and depositions were sufficient to defeat the motion for summary judgment. Therefore, it is not a miscarriage of justice if we decline to allow Easterwood to raise this argument, for the first time, on appeal.

B. *The Appropriateness of Summary Judgment*

Easterwood alleged that CSX was negligent for a number of reasons. First, Easterwood alleged that CSX was negligent for failing to maintain the crossing properly by failing to trim vegetation and level a hump near the tracks. Second, Easterwood alleged that CSX was negligent in maintaining the crossing properly by failing to install adequate warning signals. And third, Easterwood alleged that

the train was negligently exceeding a reasonable speed at the time of the accident.[1] We will first examine whether, as CSX claims, federal law pre-empts each of these state law claims. We will then determine whether summary judgment was warranted for any of the surviving claims.

1. Federal Pre-emption

[2] The Supreme Court has recognized that state law[2] is pre-empted under the Supremacy Clause in three circumstances. First, pre-emption will occur when Congress explicitly indicates that it intends to pre-empt state law. *English v. General Elec.*,—U.S.—, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990). The courts, however, will attempt to narrowly tailor the scope of the pre-emption to match congressional intent. *Id.* Second, pre-emption will be implied when Congress has indicated that the federal government will exclusively occupy a field of regulation. The *English* Court noted that congressional intent can be implied when the statutes and regulations are so pervasive that there is

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[1] Easterwood also alleged in her complaint that the train was negligent per se for violating a town speed ordinance and that CSX was negligent for failing to install an energy absorbing device in the front of the train. At the start of oral argument before the district court, Easterwood specifically abandoned these two claims. Easterwood cannot, at this late date, resurrect these claims in this court.

[2] It is clear that if federal law pre-empts state law then state tort law would be pre-empted regardless of whether it is common-law based or statutorily based. *See San Diego Bldg. and Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). The Supreme Court's holding in *Silkwood v. Kerr-McGee*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), is not to the contrary. In *Silkwood*, the Court held that Congress explicitly pre-empted state legislative and regulatory law in the nuclear power field while at the same time Congress explicitly chose to allow private parties to bring tort suits under state tort law. The Court noted that Congress' explicit intent to pre-empt only a portion of state law made nuclear power a special case. We decline to find, as Easterwood urges, that *Silkwood* holds that tort law is somehow immune to pre-emption.

no room left for state regulation or when there are strong federal interests in exclusively regulating the field. *Id.* However, congressional intent must be " 'clear and manifest' " if the allegedly pre-empted field includes areas of traditional state interest. *Id.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)). Third, pre-emption will be implied when state law "actually conflicts with federal law." *Id.* Under this variety of pre-emption, if a party cannot comply with both federal and state law or when state law interferes with the accomplishment of congressional objectives, courts will imply pre-emption.

With these standards in mind, we turn to the legislative history of the Federal Railroad Safety Act of 1970, Pub.L. No. 91-458 (codified as amended at 45 U.S.C.A. § 421 *et seq.* (1986)). The Railroad Safety Act is the primary source of legislation dealing with the various railroad safety problems. The legislative history indicates that Congress was wary of the role of the states in rail safety. The House report stated that "[t]he committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." H.Rep. No. 1194, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin.News 4104, 4109 (hereinafter House Report). The committee also noted that "where the federal government has authority, with respect to rail safety, it *preempts the field.*" House Report at 4108 (emphasis added).

The Railroad Safety Act was the out-growth of a report from a task force on railroad safety. The task force was primarily concerned with grade crossing accidents and derailments. *See* House Report, Appendix F, 4125, 4126-27. The task force noted the problems inherent in a hodge-podge of state safety regulations and concluded that "railroad safety . . . requires a more comprehensive national approach." *Id.* at 4127. The task force recognized the

potential tension between the need for increased speed and efficiency and the need for safety. *Id.* at 4128. One of its conclusions was that in order to obtain both higher speeds and increased safety, safer grade crossings and a better educated public were needed. *Id.* The task force concluded that "[t]he motoring public is part of the safety problem at the grade crossing." *Id.* The task force recommended, among other things, a set of "uniform procedures and standards" to regulate grade crossings. *Id.* at 4130.

The Railroad Safety Act sought "to promote safety . . . and to reduce railroad-related accidents." 45 U.S.C.A. § 421 (1986). The Secretary of Transportation, through the Act, was authorized to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety . . ." 45 U.S.C.A. § 431(a)(1) (1986). Congress declared "that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." 45 U.S.C.A. § 434 (1986). However, Congress passed a savings clause, allowing states to adopt or continue in force any law relating to railroad safety until the Secretary of Transportation adopted a rule covering the same subject matter.[3] *Id.*

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[3] Congress also passed a second savings clause permitting states to adopt more stringent state rules in order to eliminate a local safety hazard as long as the state rule is not incompatible with federal standards and the state rule does not create an "undue burden on interstate commerce." 45 U.S.C.A. § 434 (1986). This savings clause is irrelevant to the case at hand because a state does not legislate a general duty of care in order to eliminate a local safety hazard. The legislative history makes it abundantly clear that this savings clause is to be narrowly construed. The House Report states:

> The purpose of this . . . provision is to enable the States to respond to local situations not capable of being adequately encompassed within uniform national standards. The States will retain authority to regulate individual local problems where necessary to eliminate or reduce essentially local railroad safety hazards. Since these local hazards would not be

We can draw a few conclusions from this legislative history. The legislative history makes clear that because Congress was concerned with the problems created by the hodgepodge of state regulations it explicitly stated that it intended to pre-empt all state regulations covering the same subject matter as the federal regulations. Therefore, our initial task is to examine each claim and determine if any federal regulations have been promulgated which cover the conduct at issue. In such cases, we will find explicit federal pre-emption, but we will attempt to narrowly tailor the pre-emption to match Congress' intent. However, even in the absence of a specific regulation, it is entirely possible that the breadth of the regulations, in the context of Congress' intent to pre-empt the field of railroad safety regulation, *see* House Report at 4108, may be sufficient for us to imply pre-emption of the entire field.

a. *Speed Limit*

[3] Easterwood claims that the accident was caused because the train was traveling at a negligently high rate of speed. Various affidavits from the parties estimate the train speed at 32-50 m.p.h. on a section of track with a maximum speed of 60 m.p.h. We note that the question of train speed has been addressed by Congress through the Secretary of Transportation. The Secretary has established regulations governing the maximum speed for passenger and freight trains on various classes of track. *See* 49 C.F.R. 213.9 (1990). We therefore find this claim to be pre-empted since Congress has stated that as soon as the Secretary has established a safety regulation all state regulations govern-

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> Statewide in character, there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter.

House Report at 4117. We therefore find this savings clause inapplicable to the case at hand.

ing the same area are pre-empted. *See* 45 U.S.C.A. § 434 (1986).

[4] Easterwood first argues that pre-emption is inappropriate because the speed limits were not adopted in order to minimize the number of grade crossing accidents. Easterwood notes that the various speed limits found in 49 C.F.R. 213.9 (1990) are related to the class of track and the curve of the track. *See* 49 C.F.R. § 213.57 (1990). Easterwood notes that sections of track are classified on the basis of several factors including the track ballast, 49 C.F.R. § 213.103 (1990), the number and quality of the cross ties, 49 C.F.R. §§ 109, 113 (1990), etc. Easterwood points to these factors and notes that the speed limits are not related to the density of the surrounding population. Easterwood, therefore, concludes that the Secretary adopted the speed limits to prevent derailments and not to prevent grade crossing accidents. However, the Supreme Court held in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), that it is irrelevant to pre-emption analysis whether the state law's objectives are similar to or different from the federal law's objectives. Pre-emption analysis turns on Congress' intent to pre-empt state law and on the nature of the federal regulations. The *Florida Lime & Avocado Growers* Court noted that a comparison of the similarities and divergences in the objectives of the federal and state regulations is simply a poor predictor of whether the federal regulations will pre-empt state law. *Id.* Moreover, Easterwood does not point to any legislative history for the speed limits and therefore she asks us to guess at the motives behind the Secretary of the Treasury. Such guessing is inherently suspect. While Easterwood assumes that the speed limits are designed to prevent derailments, it is equally valid to assume that the speed limits were set low enough that, in conjunction with adequate grade crossing signals and gates, the speed limits were intended to lessen the number of grade crossing accidents as well as lessen the chances of derailments.

Easterwood next argues that CSX's compliance with a speed limit should not affect a finding of negligence. Easterwood draws an analogy between compliance with the train speed limit and compliance with the national highway speed limit. *See* 23 U.S.C.A. § 154 (1990). Easterwood argues that an automobile driver's compliance with the 65 m.p.h. federal speed limit does not insulate a driver from liability. *See* Restatement (Second) of Torts § 288C (1965) ("Compliance with a legislative enactment . . . does not prevent a finding of negligence where a reasonable [person] would take additional precautions"). If the train speed limits were not part of a comprehensive statute, perhaps Easterwood's position would have merit. The code section governing highway speed limits does not directly overrule contrary state laws. This code section places conditions on the use of federal moneys. It therefore, only indirectly, establishes uniformity. More importantly, the train speed limits are part of a statutory scheme which explicitly pre-empts state regulations covering the same subject matter. While Easterwood's argument is superficially persuasive, the fundamental differences in the statutory scheme and legislative histories of the two acts require us to find federal pre-emption in the case of train speed limits.

b. *Vegetation*

[5] Easterwood also claims that excessive vegetation on the side of the track obstructed the views of the train engineers and the decedent, thereby causing the accident. We find this claim to be partially pre-empted. Under 49 C.F.R. § 213.37 (1990), track owners must keep vegetation on or immediately adjacent to the tracks under control. Because the Secretary has chosen to regulate vegetation, Congress explicitly has pre-empted all state regulation in this area. *See* 45 U.S.C.A. § 434 (1986); *See also Missouri Pac. R.R. Co. v. Railroad Comm. of Tex.*, 833 F.2d 570 (5th Cir.1987) (holding that 49 C.F.R. § 213.37 pre-empts all state regulation of vegetation immediately adjacent to railbed).

However, while the Secretary has chosen to regulate the vegetation on and immediately adjacent to the railbed, the Secretary has not regulated vegetation which is not immediately adjacent to the railbed. *Id.* Therefore, we choose to adopt that portion of *Missouri Pac. R.R. Co.* dealing with state regulation of railroad vegetation. To the extent that Easterwood is bringing a claim for the vegetation near, but not immediately adjacent to, the tracks, this claim is not pre-empted.

c. *Adequacy of the Grade Crossing*

Easterwood also argues that the grade crossing was inadequately constructed. Easterwood claims, among other things, that the flashing lights were positioned in such a way that they could be obscured by the morning sun. Easterwood also complains that the grade crossing did not have a cross bar.

While the legislative history of the Federal Railroad Safety Act evinces a strong concern about the hundreds of annual deaths in grade crossing accidents, neither the Act nor the regulations specifically address the problem through federal regulation of the signals and the design of grade crossings. The Act requires the Secretary of Transportation only to study problems with existing grade crossings, *see* 45 U.S.C.A. § 433 (1986), and to create grade crossing demonstration projects, *see* 45 U.S.C.A. § 445 (West Supp.1990). Moreover, the Secretary of Transportation has not promulgated any regulations regarding grade crossings under his general power to regulate railroad safety. *See* 45 U.S.C.A. § 431(a)(1) (1986); *see also* 49 C.F.R. Parts 200-240 (1990).

Congress has passed legislation elsewhere in the code dealing with the grade crossing problem. Part of the chapter dealing with federal aid for highway projects includes a provision requiring states to conduct a systematic survey of all railroad crossings and then create and implement a schedule for bringing the grade crossings into compliance

with the Manual on Uniform Traffic Control Devices for Streets and Highways. *See* 23 U.S.C.A. § 130 (1990); 23 C.F.R. § 646.214(b)(1) (1990). The states then would be eligible to use federal highway funds to aid the improvements. *See* 23 U.S.C.A. § 130(a) (1990).

[6] CSX claims that the Railroad-Highway Crossing section of the chapter on Federal-Aid Highways pre-empts all state law. We disagree. This section of the code requires the states to survey all of the grade crossings and to formulate a schedule of possible projects. 23 U.S.C.A. § 130(d) (1990). This section does not explicitly or implicitly pre-empt any state laws except perhaps any laws dealing with surveying and prioritizing projects. First, as opposed to the Federal Railroad Safety Act, *supra*, this section contains no explicit provisions pre-empting contrary or similar state law. Second, we are unable to imply pre-emption because this statute is not such a pervasive set of regulations that we could fairly imply a congressional intent to pre-empt the field.[4] The statute allows states to apply for federal aid. While Congress could have attached conditions on the aid money which would pre-empt all state laws, it did not. Finally, we are unable to find any actual conflict between the state and federal law. Allowing tort suits to go forward against railroad companies simply does not affect (or at best it only tangentially affects) the provision of federal aid to the states to help them build better railroad grade crossings.

[7, 8] Nevertheless, CSX points to Judge (now Justice) Kennedy's opinion in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir.1983). The *Burlington Northern* court implied in *dicta* that when a crossing has been upgraded by the states through the federal highway aid pro-

[4] Moreover, since the allegedly pre-empted field includes the pre-emption of state tort law, an area of traditional state interest, we would have to find a "clear and manifest" congressional intent in order to imply pre-emption. *See English v. General Elec.*, 110 S.Ct. at 2275.

gram then the railroads are insulated from liability. *Id.* at 1154. Even if *Burlington Northern* were the law of this Circuit,[5] this language is distinguishable from the case at bar. The record reflects that due to various financial constraints and logistical problems, the state wanted to upgrade the site but was unable to perform the upgrade. We hold that a policymaker's failure to act is insufficient to constitute pre-emption. We therefore adopt the conclusion of the Fifth Circuit and find that there is a qualitative difference between a failure of a policymaker to act and a case where the policymaker evaluates a situation and then decides not to act "because [he or she has] determined it is appropriate to do nothing." *Missouri Pac. R.R. Co.*, 833 F.2d at 576. Therefore, because the state has neither upgraded the grade crossing nor affirmatively decided that the existing crossing was adequate, we have no occasion to decide whether a federally sponsored upgrade would insulate the railroad from liability. We do hold that, in the absence of a decision by a federally designated policymaker, state common-law liabilities are not affected by the federal highway aid provisions.

d. *The Hump in the Road*

[9] Finally, Easterwood claims that there is a steep hump in the road elevating the railroad track above the roadway. Easterwood claims that traffic is forced to slow down in order to navigate over the hump. CSX does not cite, nor can we find, any federal statute or regulation regulating the angle of the roadway as it approaches the railroad tracks. Therefore, we conclude that this claim is not pre-empted.

In short, Easterwood's claims based on CSX's allegedly negligent speed and CSX's failure to trim the vegetation

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[5] In light of the preceding analysis, we have reservations about the holding of *Burlington Northern*.

on or immediately adjacent to the tracks are pre-empted by federal law. Easterwood's claims based on CSX's failure to trim non-adjacent vegetation, CSX's failure to remove the hump in the road, and CSX's negligence in designing the grade crossing, all survive federal pre-emption analysis. We therefore turn to state law to determine if summary judgment was warranted for any of these claims.

2. The Surviving State Law Claims

a. *The Vegetation Claim*

Easterwood claims that the vegetation on the side of the track contributed to the accident. The district court granted summary judgment because it held that there was no evidence that the vegetation either played a role in this incident or was within the defendant's control.

[10, 11] We reverse the district court's grant of summary judgment on this claim for two independent reasons. After closely studying the defendant's briefs before the district court and before this court, we are unable to find any summary judgment request by the defendant on the vegetation claim. The district court therefore acted *sua sponte*. The district court may grant summary judgment on an issue only if a party moves for summary judgment on that issue. *See* Fed.R.Civ.P. 56(b) & (c).

[12] We also reverse the district court because the summary judgment is simply not warranted. Summary judgment is warranted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). However, there is more than adequate evidence in the record to support the inference that vegetation played a role in this accident. Among other pieces of evidence, the brakeman on the train, Bobby Lanham, reported in his deposition that immediately following the accident he told an investigating police officer that some bushes and trees played a role in the accident. While this piece of evidence

alone mandates denial of the defendant's summary judgment motion, one of the plaintiff's experts, Fogarty, stated in his deposition that the trees contributed to the dangerousness of the crossing. That statement, in conjunction with the rule that all evidence must be viewed in the light most favorable to the non-moving party, also would be sufficient to require a denial of summary judgment. *See Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir.1990).

[13] Second, there is adequate evidence in the record demonstrating that the railroad is responsible for the vegetation. Fogarty testified that the trees were on the railroad's property. And, regardless of whose property the trees were on, the trees contributed to the dangerousness of the intersection and therefore increased the need for better signals. Therefore, even if the trees are out of the railroad's control, their very presence increases the need for the railroad to take other steps to improve the safety of the intersection. Finally, the Georgia code places the initial burden of production on the railroad to prove all facts that are peculiarly within the railroad's knowledge. Ga.Code Ann. § 46-8-292 (1982); *see also Southern R.R. Co. v. James*, 170 Ga.App. 73, 316 S.E.2d 159 (1984).[6] Thus, the statute places the burden of production upon the railroad to show that the trees are not on the railroad's property.[7]

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[6] In this diversity action, the substantive law to be applied is Georgia tort law, while federal law governs the procedure. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Despite their procedural nature, burdens of proof are sufficiently related to substantive rights that they are governed by state law in diversity actions. *See Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939).

[7] At trial, the burden of proving pre-emption rests with the party asserting it. Therefore the defendants may rebut the vegetation claim by establishing that all the trees at issue are those covered by federal

b. *The Hump in the Road*

Easterwood claims that the hump in the road contributed to the accident. The District Court granted summary judgment because it held that there was no evidence that the hump either played a role in the accident or was within the defendant's control. We reverse the district court because once again the defendants did not move for summary judgment on this issue.

[14] We also reverse the district court on the independent ground that summary judgment on this issue is not warranted. Easterwood has placed into the record a plethora of evidence demonstrating that the hump was dangerous and contributed to the accident. Fogarty testified at his deposition at length about the steepness of the hump and he stated that studies have concluded that when navigating similar humps drivers slow down and concentrate to such a degree on the hump that they fail to notice approaching trains. The expert also mentioned that the literature has warned of the dangers of humps and railroad crossings for over 40 years. Moreover, the brakeman on the train testified that Mr. Easterwood drove very slowly up the hump and onto the train tracks. Mr. Easterwood's conduct matches the conduct found in the studies provided by the expert. Because we are required to draw every reasonable inference in favor of the non-moving party, *Earley*, 907 F.2d at 1080, we must infer that the hump caused Mr. Easterwood to drive in the manner that he did.

[15, 16] Furthermore, the district court's holding that there was insufficient evidence that the defendant was responsible for maintaining the hump is also incorrect. First, the Georgia Code explicitly recognizes the duty of the railroad to maintain all of its grade crossings "in such condition as to permit safe and convenient passage of public

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regulations. Of course, this is a question of law to be decided by the trial judge.

traffic." Ga.Code Ann. § 32-6-190 (1985). This duty at the very least extends two feet beyond the cross ties. *Id.*[8] Second, the Georgia Code states that proof that a train hit a person is rebuttable prima facie evidence of negligence on the part of the railroad. Ga.Code Ann. § 46-8-292 (1982). Therefore, the district court cannot issue summary judgment until the railroad overcomes its burden of production. Third, there was evidence that the hump contributed to the dangerousness of the grade crossing and therefore increased the need for better signals and warnings.

c. *The Warnings at the Grade Crossing*

CSX argues that it met, as a matter of law, its duty to warn because it claims that the existing warning signals and the train's whistle were sufficient to put Mr. Easterwood on notice. CSX points out that the train's head light was illuminated and that the whistle was blowing. CSX also alleges that the intersection had three separate sets of dual, red warning lights which are activated by an approaching train 1500 feet from the intersection. Therefore, motorists have anywhere from 17 to 32 seconds notice of the train's approach.[9] CSX also alleges that the crossing had passive warnings including two reflectorized railroad crossbuck signs, a white stop bar and a white "RXR" warning painted on Cook street, and a yellow "RXR" advance railroad warning sign.

[8] The statute strongly implies that the duty may extend beyond the two feet mentioned in the statute.

[9] The engineer claimed that the train was travelling at 32 m.p.h. or 46.93 feet per second. At such a speed, we take judicial notice that the 1500-foot motion detector would afford automobiles approaching the grade crossing a 31.96-second warning. Various witnesses claimed the train was going up to 50 m.p.h. or 73.33 feet per second which would result in a 20.46-seconds notice. CSX claims that because the track has a 60 m.p.h. speed limit its trains can travel up to 60 m.p.h. or 88 feet per second which would result in 17.05 seconds of notice. While the plaintiff's claim of negligence based on excessive speed is pre-empted, evidence of speed is relevant to the issue of the adequacy of the warning system.

CSX argued to the district court that as an alternative to finding pre-emption for this claim, the district court could grant summary judgment on the claim itself. The district court granted summary judgment on pre-emption so it did not reach CSX's alternative argument. CSX renewed the alternative argument in this Court. Because we decline to find pre-emption, we now turn to the merits of this claim.[10]

[17] Georgia law recognizes a cause of action for a failure by a railroad to warn adequately of the approach of a train to a grade crossing. *See Isom v. Schettino*, 129 Ga.App. 73, 199 S.E.2d 89 (1973). CSX argues that the existing passive and active warnings are sufficient for this Court to conclude that it was not negligent as a matter of law. However, there is a significant amount of evidence in the record suggesting that this grade crossing is extremely dangerous and that better warnings were needed. One traffic expert, Burnham, testified in his deposition that the design of the grade crossing made it extremely hazardous: he testified that the road does not cross the tracks on a perpendicular angle; that there are private roads placing substantial traffic into the intersection; and that immediately after crossing the tracks a driver would have to attempt to merge with highway traffic. Another expert, Fogarty, testified about the dangers of the hump in the grade crossing. There also are various references throughout the depositions that more than a few accidents had occurred at this

[10] We found in section III.B.1.c., *supra*, that this claim was not pre-empted by federal law. The Georgia Court of Appeals has rejected the parallel argument that a similar claim was pre-empted because the Georgia Department of Transportation allegedly decides which warnings are appropriate for a given grade crossing. *See Southern R.R. Co. v. Georgia Kraft Co.*, 188 Ga.App. 623, 373 S.E.2d 774 (1988).

crossing. Both of the two traffic experts testified that the existing signs were not in compliance with various regulations and standard accepted engineering practices. One of the experts, Burnham, witnessed the existing warning signals malfunctioning by signaling that a train was coming when none ever came. Another witness, Taylor, stated that he was almost hit by a train a week before the accident and that the signals never warned him of the train's approach. Burnham also stated that the stop bar painted on the road was faded. Fogarty stated that one of the warning crossbucks was partially obscured by a power pole and thus fell below regulations and that the second cross buck was positioned so that it was not visible to approaching traffic. Fogarty also concluded that the warning lights failed to meet standards because they were located and designed so that they were easily obscured by the morning sun. A third expert, McLendon, noticed that the warning lights were extremely dirty. As a result of the dangers of the intersection and the inadequacies of the existing warning systems the two traffic experts and a retired railroad engineer concluded that gates were needed at this intersection. It is clear that summary judgment is not warranted because there is a material issue of fact as to whether the existing warning signs are adequate.

d. *Contributory Negligence*

CSX finally argues that summary judgment should have been granted because Easterwood's action is barred under the doctrine of contributory negligence. In grade crossing accidents under Georgia law, a plaintiff's action is barred if he or she is more than 50% at fault. *See* Ga. Code Ann. § 46-8-291 (1982). The existence of contributory or comparative negligence is one of fact "and will not be determined by the courts as a matter of law except in palpably clear, plain and undisputed cases." *Iler v. Seaboard Air Line R. Co.*, 214 F.2d 385, 388 (5th Cir.1954) (applying the Georgia grade crossing comparative negligence law).

In Georgia, contributory negligence has been held to be clear in at least two types of cases. If the driver is aware of the train and attempts to beat the train, then the proximate cause of the accident is not, as a matter of law, the railroad's failure to warn. *See Southern Ry. v. Blake*, 101 Ga. 217, 29 S.E. 288 (1897).[11] Similarly, if the driver saw the train, or in the exercise of ordinary care should have seen the train, and nevertheless continued across the tracks, then the railroad cannot be held liable for failing to warn. *See Seaboard Coast Line R.R. Co. v. Mitcham*, 127 Ga.App. 102, 192 S.E.2d 549 (1972).[12]

[18] CSX argues that summary judgment is warranted on this claim because Easterwood was wholly at fault for entering the grade crossing when he did. There, however,

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[11] CSX relies heavily upon *Joyce v. Georgia, S. & Fla. Ry. Co.*, 122 Ga.App. 712, 178 S.E.2d 575 (1970), a case which in many ways resembles the case at hand. However, we find *Joyce* distinguishable because despite the similarities there is one large distinguishing factor: the court in *Joyce* concluded that the decedent "must have seen the [warning] signal, as disclosed by the stopping of his vehicle short of the tracks." *Id.* 178 S.E.2d at 576. This fact is crucial to *Joyce's* analysis and absent from the case at hand. There is absolutely no evidence in the record that the decedent actually saw, or acted as if he saw, either the signal or the train before he went across the tracks.

[12] Oddly enough, there is a whole genre of cases in which automobile drivers hit the twentieth or so car in a freight train and then attempted to sue the railroad for the failure to warn. *See, e.g., Pate v. Georgia S. & Fla. Ry. Co.*, 196 Ga.App. 211, 395 S.E.2d 604 (1990); *Suib v. Seaboard Sys. R.R., Inc.*, 185 Ga.App. 713, 365 S.E.2d 842 (1988); *Seaboard Coast Line R.R. v. Sheffield*, 127 Ga.App. 580, 194 S.E.2d 484 (1972). The Georgia Courts have uniformly denied recovery in these "car hits train" cases. In doing so, the courts have broadly stated that, absent special circumstances, railroads do not owe a duty to warn drivers of "something as starkly obvious as a train." *Sheffield*, 194 S.E.2d at 485. However, it is clear that, because of the context of the language in the original *Sheffield* opinion and because this language has been quoted only in these "car hits train" cases, the language has been implicitly limited by the Georgia courts to this genre of cases.

is absolutely no evidence that Easterwood tried to beat the train across the tracks or that he actually knew about the train before starting to cross the tracks. The undisputed evidence shows that Mr. Easterwood slowly approached the intersection and without varying his speed slowly drove into the path of the train. Viewing this evidence in the light most favorable to the non-moving party, *Earley*, 907 F.2d at 1080, we can only conclude that Mr. Easterwood did not attempt to beat the train across the tracks and that he actually was unaware of the oncoming train.

[19] While there is absolutely no evidence showing that Mr. Easterwood actually knew about the signals or about the oncoming train before entering onto the tracks, the evidence as to whether he should have known about the oncoming train is conflicting. Ms. Stephenson stated in her affidavit that she was directly behind Mr. Easterwood and that when she was a block away she heard the train whistle and the rumble of the train. She then stated that she saw the red flashers warning of the oncoming train before they got to the grade crossing. Ms. Stephenson therefore both saw and heard indications that a train was coming. However, there are disputes of material facts as to both of these areas of Ms. Stephenson's statement. Another eye witness, Sheppard, disputed Ms. Stephenson's statement that the lights activated when Mr. Easterwood was some distance from the intersection. This witness stated that the lights activated "just prior to the time Mr. Easterwood drove under them." That same witness testified that the sun was bright that morning and that Mr. Easterwood was traveling east. The plaintiff's expert, Fogarty, testified that the warning lights were poorly designed and poorly located, increasing the risks of a problem with glare. Furthermore, there was considerable evidence that the warning lights were highly unreliable and that because they produced false warnings, locals tended to ignore the warnings. Easterwood depos. at 64 (stating that she has been with her husband on at least one occasion when the lights flashed but no train showed up); Burnham depos. at 28, 39

(stating that while he was studying the grade crossing the lights malfunctioned and that several cars ignored the lights and went through the grade crossing.) Also, there was extensive record support for the proposition that motorists had a limited view of any oncoming trains due to various obstructions, including vegetation. Fogarty depos. at 62-64 (The line of sight was 150' when motorists need 720' to observe oncoming trains going 30 m.p.h. and to be able to clear the tracks in time.) It therefore is debatable whether Mr. Easterwood saw the flashing warning lights due to their timing and the possibility of glare.[13] Furthermore, there is evidence in the record showing that if Mr. Easterwood had not seen the warning lights, then the inadequate line of sight would have prevented him from seeing the train with sufficient time to avoid the accident.

Also there is some dispute in the record as to whether Mr. Easterwood should have reasonably heard the train and the various bells and whistles. First, there is evidence in the record that Mr. Easterwood had turned on his heater on that cold morning. Taking all the reasonable inferences in the non-movant's favor, we can conclude that he probably had his windows closed. There also were statements,

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[13] CSX is correct that Ga.Code Ann. § 40-6-140 (1989) which requires motorists to stop at all grade crossings when "[a] clearly visible . . . signal device gives warning of the immediate approach of a train" results in violators being deemed contributorily negligent as a matter of law. *See Atlantic Coast Line R.R. Co. v. Hall Livestock Co.*, 116 Ga.App. 227, 156 S.E.2d 396 (1967). However, it is a disputed question of fact whether the signal device was "clearly visible." Furthermore, the *Hall Livestock* court held that the statute applied only to those who were aware of an oncoming train and ventured onto the tracks. The court noted that cases brought by motorists who were *actually* unaware of the nearness of the train were governed by common-law determinations of reasonableness and not by this statute. *Id.* 156 S.E.2d at 398.

contradicting Ms. Stephenson's statements, that the train did not sound its whistle.[14]

In conclusion, there is sufficient evidence in the record creating a dispute of material issues of fact for us to conclude that summary judgment is not warranted on the issue of whether Mr. Easterwood's contributory negligence is the cause of the accident. In so holding we note that contributory negligence is almost invariably a question for the jury and that CSX bears the burden of proof on this issue at trial.

IV. CONCLUSION

We AFFIRM the court below on its finding that federal law pre-empts the speed claim and a portion of the vegetation claim. We REVERSE the court below on its finding that federal law pre-empts the negligently designed crossing claim and a portion of the vegetation claim. We also REVERSE the district court's grant of summary judgment for each of the non-pre-empted claims and for the case as a whole. We REMAND this case for further proceedings consistent with this opinion.

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[14] While generally positive testimony (such as I heard the whistle) is better than negative testimony (such as I did not hear the whistle) the district court may not accept positive testimony to the exclusion of negative testimony on a motion for summary judgment. It is a credibility question whether one witness' memory is more reliable than another witness' memory, and such credibility determinations are not to be made on a motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510-2511, 91 L.Ed.2d 202 (1986).

Appendix B

Order of The United States District Court

Lizzie Beatrice EASTERWOOD, Plaintiff,

v.

CSX TRANSPORTATION, INC., Defendant.

Civ. A. 4:88-CV-0141-RLV.
United States District Court,
N.D. Georgia.
Aug. 8, 1990.

ORDER

VINING, District Judge.

This negligence action is before the court on the defendant's motion for summary judgment and the plaintiff's motion for reconsideration of the court's oral grant of summary judgment after hearing arguments by the parties. Also pending is the plaintiff's motion to file supplemental evidence in opposition to the motion for summary judgment. Having considered the parties' briefs and oral arguments, the court hereby GRANTS the defendant's motion for summary judgment and DENIES the plaintiff's motion for reconsideration and motion to supplement the record.

[1] The plaintiff seeks to file with the court supplemental evidence supporting its motion for reconsideration of the court's March 22, 1990, oral grant of summary judgment for the defendant. This motion is premised on the plaintiff's argument that she did not have sufficient time to adequately respond to the motion for summary judgment because the action was on a trial calendar scheduled to begin approximately four weeks after the filing of

the motion for summary judgment. The court, however, finds this argument insufficient to justify the court's consideration of such evidence at this late stage of the proceedings.

After reviewing the parties' summary judgment briefs this action was removed from the trial calendar and oral arguments were scheduled for March 22, 1990. At no time during this three month delay or prior to oral arguments did the plaintiff file with the court additional affidavits or exhibits or a motion to extend time. Instead, at oral arguments plaintiff's counsel sought to introduce a single additional affidavit. The court refused to consider the affidavit because it was not filed prior to the hearing of the motion for summary judgment. Similarly, plaintiff now seeks to file with the court evidence intended to create genuine issues of material fact in an attempt to avoid summary judgment. The court, however, finds no justification for the plaintiff's failure to produce evidence available or known to her at the time of the original hearing. Accordingly, the court finds that such evidence was not filed in a timely manner and will not be considered.

In this action the plaintiff seeks damages for the death of Thomas Easterwood, ("Easterwood"), in connection with an accident involving Easterwood and a CSXT train on February 24, 1988, at the Cook Street crossing in the City of Cartersville, Georgia. The plaintiff alleges that CSXT was negligent in failing to install gate arms at the Cook Street crossing, in operating the train at an unsafe speed, and in allowing vegetation to grow along the side of the track thus preventing Easterwood from seeing the train.[1]

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[1] The plaintiff's complaint also contained allegations that the defendant was negligent in failing to comply with the Cartersville Municipal Train Speed Ordinance and in failing to equip the train with an energy absorbing device. At oral argument the plaintiff withdrew these claims.

The defendant argues that Easterwood, without slowing or stopping, drove his motor vehicle through the activated red flashing warning lights and, in disregard of the train whistle, into the path of the oncoming train. Therefore, the defendant contends, there was no actionable negligence by CSXT or its agents. The defendant seeks summary judgment as to all claims based on the absence of evidence showing that the defendant's negligence was the proximate cause of the railroad crossing accident or, in the alternative, summary judgment on three of the plaintiff's claims which, the defendant argues, are preempted by federal law.

[2] Under the supremacy clause, when Congress manifests an intent that federal law occupy and control a certain field, states are precluded from interfering with the federal law. Federal preemption insures that a state's statutory and common law principles do not conflict with or frustrate the accomplishment of any federal mandate. *See Edmondson v. International Playtex, Inc.*, 678 F.Supp. 1571 (N.D.Ga. 1987); *Staggs v. Chrysler Corp.*, 678 F.Supp. 270 (N.D.Ga.1987). The defendant contends it is entitled to summary judgment on the plaintiff's claim that the accident was caused by the defendant's operation of the train at a speed greater than reasonable based on federal preemption.

[3] It is well established that Congress, through the pervasive federal regulation of railroads in the Federal Railroad Safety Act of 1970 ("FRSA"), 45 U.S.C. § 421 *et seq.*, intended to establish nationally uniform railroad safety and preempt state regulation of railroads. *See Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.1976). The FRSA specifically controls the speed at which trains may operate by classifying sections of track and assigning to each classification a maximum speed limit. The track in question is classified as class four track and, according to federal regulations, the maximum train speed for class four track is 60 miles per hour. Based on the pervasive na-

ture of federal regulation of the subject area the court finds that train speed is expressly preempted by federal law. Moreover, the court further finds that because there is no evidence that the train exceeded this federal standard, any common law or statutory negligence claim based on the train's speed is preempted by federal law. *See Sisk v. National Railroad Co.*, 647 F.Supp. 861, 865 (D.Kan.1986).

[4] Similarly, the court finds that the plaintiff's claim that the defendant was negligent in failing to install gate arms at the Cook Street crossing is preempted by federal law. Public agencies having jurisdiction over railroad crossings have the authority to select appropriate traffic control devices. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir.1983). That is, federal authority to regulate railroad crossings has been delegated to local agencies whose decisions then constitute federal decisions and have a preemptive effect. *Id.* In early 1980 the Georgia Department of Transportation ("DOT"), acting pursuant to federally delegated authority, evaluated railroad crossings in the Cartersville area and determined the warning devices necessary for the various crossings. Initially, DOT determined that gate arms should be installed at the Cook Street crossing, but the funds earmarked for this crossing were later transferred to other projects. The decision to install gate arms at the Cook Street crossing was placed on a list of projects to be considered at a later time.

Based on this evidence, the court finds that DOT made a decision not to install gate arms at the Cook Street crossing when it transferred the funds to other projects and removed the Cook Street crossing from the list of crossings to receive gate arms. Accordingly, DOT's determination constitutes a federal decision in accordance with federal law, and the plaintiff's claim that the defendant was negligent in not providing gate arms is preempted.

[5] In moving for reconsideration of the grant of summary judgment the plaintiff argues that there is a genuine issue of fact as to whether the warning devices at the Cook Street crossing malfunctioned at the time of the accident. The plaintiff generally contends that the automatic warning devices at the crossing malfunctioned often and malfunctioned at the time of the accident.

Based on the evidence properly before the court, however, the court finds that there is no issue of material fact concerning the functioning of the automatic warning devices. The defendant has presented affirmative evidence that immediately after the accident the signal lights were tested and were in working order. Kelly Deposition at 11. Furthermore, the undisputed testimony of Helen Stephenson, the motorist directly behind Easterwood as he turned onto Cook Street and proceeded through the crossing, establishes that the lights were operating and visible at the time of the accident and the train horn sounded.

In contrast, the plaintiff's evidence purporting to create a factual issue for trial consists of witness statements that they do not recall seeing the flashing warning light. Such evidence must give way to the defendant's direct and positive testimony that the warning devices were functioning at the time of the accident. Accordingly, the defendant is entitled to summary judgment on this claim.

[6] The plaintiff's final contention is that the defendant was negligent in allowing vegetation to grow along the side of the track thus preventing Easterwood from seeing the oncoming train and because there was a "hump" on the crossing which distracted motorists. Totally absent from the record, however, is any evidence that the vegetation or hump played a part in this incident. Moreover, the plaintiff has produced no evidence that the alleged vegetation was within the defendant's control.

Based on the foregoing, the defendant's Motion for Summary Judgment is GRANTED, the plaintiff's Motion for Reconsideration is DENIED, and the plaintiff's Motion to Supplement the Record is DENIED.

SO ORDERED.

Appendix C

Order of The United States Court of Appeals On Petition for Rehearing and Suggestion of Rehearing En Banc

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-8851

MRS. LIZZIE BEATRICE EASTERWOOD,
Plaintiff-Appellant,

verus

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia.

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion July 20, 11th Cir., 1991, ____F.2d____).

Before: JOHNSON and COX, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
Frank M. Johnson, Jr.
United States Circuit Judge